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# EXPORT-IMPORT BANK OF MALAYSIA BHD v. SUN HOLDING (SUN PARK HOTEL) CO LTD & ORS

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
LIM CHONG FONG JCA
B AZHAHARI KAMAL RAMLI JCA
[CIVIL APPEAL NO: N-02(W)-579-04-2022]
21 MAY 2024

C **Abstract** – *The concept of duty of care is undoubtedly part and parcel of the law of tort of negligence. Pursuant to s. 101 of the Evidence Act 1950, the party who pursues a counterclaim for breach of duty of care, bear the legal burden of proof that its counterclaim is sustainable under the applicable law. It is incumbent upon the court to apply the proper applicable law of tort, so as not to commit a fundamental and material* D *error of law warranting appellate intervention.*

***TORT:*** *Negligence – Duty of care – Breach – Allegation of – Applicable law of tort of negligence – Whether party who pursued counterclaim for breach of duty of care bear legal burden of proof that its counterclaim was sustainable under applicable law* E *– Double actionability rule – Whether satisfied – Whether financial institution estopped from insisting on strict application of proper applicable law in determining counterclaim*

***TORT:*** *Negligence – Duty of care – Breach – Allegation of – Whether financial* F *institution breached duty of care while exercising power of sale of properties secured pursuant to loan facilities – Whether financial institution has duty of care in law to ensure best possible price obtained whilst disposing land – Whether duty of care negatived by contractual provisions entered into by parties in connection with loan – Whether party who pursued counterclaim for breach of duty of care bear legal* G *burden of proof that its counterclaim was sustainable under applicable law – Double actionability rule – Whether satisfied – Whether financial institution estopped from insisting on strict application of proper applicable law in determining counterclaim*

This was an appeal against the decision of the High Court that found a financial institution was in breach of its duty of care while exercising its H power of sale of properties secured pursuant to loan facilities given to undertake a property development in Lao People's Democratic Republic ('Lao PDR'). The appellant was a development financial institution while the first respondent was a Laotian company and the second and third respondents were Malaysian individuals. In 2002/2003, the Government of Lao PDR requested the first respondent associated with Rancang Timur Sdn Bhd to I construct a hotel. Consequently, by a master agreement and a land lease agreement, the Government of Lao PDR leased to Rancang Timur Sdn Bhd a plot of land located alongside the Mekong River ('land'). The first

respondent procured loan financing amounting to USD14,000,000 to develop the hotel and tourist complex from the appellant ('loan'). Toward this end, the appellant and the first respondent executed, *inter alia*, a facility agreement, supplementary agreement and security agreement. Moreover, the appellant and Rancang Timur Sdn Bhd executed, *inter alia*, a mortgage agreement and a deed of assignment. In addition, the appellant and the second and third respondents as well as one Dato Cheok Thian Sang executed, *inter alia*, irrevocable and unconditional joint and several guarantees. Subsequently, the appellant and the first respondent agreed to the re-structuring of the loan as well as the provision of an additional loan of USD29,237,359.56 ('additional loan') and accordingly executed the restructuring agreement. In 2009, the parties involved defaulted on the re-structured loan and the appellant, as a result, terminated the loan facilities and demanded re-payment of the sum of USD35,852,060.66. The appellant thus exercised its power of sale under the mortgage agreement as well as the deed of assignment (rights under the master agreement) and deed of assignment (rights under the land lease agreement). Consequently, the appellant and CAMCE Investment (Lao) Co Ltd ('CAMCE') executed the sale and purchase agreement of the land at the consideration of USD36,000,000 as well as the first supplementary agreement and second supplementary agreement. The land including the Donn Chanh Palace Hotel built thereon had been subsequently transferred to Mascena Co Ltd which was a special purpose vehicle owned by the appellant and CAMCE. The appellant then commenced a suit against the respondents and Dato Cheok Thian Sang for the recovery of the loan arrears. At the High Court, the appellant claimed for the outstanding amount owed by the respondents pursuant to the facility agreement as well as the irrevocable and unconditional joint and several guarantees respectively. However, the respondents and Dato Cheok Thian Sang counterclaimed for breach of duty of care in respect of the appellant's disposal of the security of the loan facilities. The High Court Judge ('HCJ') allowed the counterclaim. Dissatisfied, the appellant appealed. Two principal issues that arose were: (i) whether the appellant has the duty of care in law to ensure the best possible price was obtained whilst disposing the land; and (ii) whether, if so, the duty of care had been negatived by the contractual provisions entered into by the parties in connection with the loan.

**Held (allowing appeal)**
**Per Lim Chong Fong JCA delivering the judgment of the court:**

**(1)** The concept of duty of care was undoubtedly part and parcel of the law of tort of negligence. According to the appellant, the applicable law of tort of negligence was Lao PDR law by virtue of the agreed fact between the parties. However, the HCJ applied the English common law of tort on duty of care on the assumption that the applicable law of tort on duty

of care existed and was similar under Lao PDR law in respect of the sale of mortgaged Laotian land. Although the Malaysian court has jurisdiction to decide the counterclaim of the respondent on the alleged negligence of the appellant in disposing the land without prior ascertaining its true market value, it was still incumbent upon the High Court to apply the proper applicable law of tort. (paras 28-39)

**(2)** Since the respondents were the parties who pursued the counterclaim for breach of duty of care by the appellant, it was plain pursuant to s. 101 of the Evidence Act 1950 that the respondents bear the legal burden of proof that their counterclaim was sustainable under the applicable law. It was not in dispute that the respondents did not lead any expert evidence whatsoever on the law of tort of negligence of the Lao PDR. Consequently, the respondents authoritative did not satisfy the double actionability rule (r. 203 cls.(1)(a) and (b) of the authoritative treatise Dicey & Morris on *The Conflict of Laws,* 12th edn (1993)) which was critical in law for them to succeed on their counterclaim. Further, the limited exception (r. 203 cl. (2)) was inapplicable because the respondent had not demonstrated cogent reasons to justify invocation of the same. That notwithstanding and even if r. 203 cl. (2) was applicable, the law that has the most significant relationship to the occurrence of the tort and the parties was still Lao PDR law by reason that the land concerned was situated in Lao PDR as well as that the first respondent was a Lao PDR registered company. It was also an agreed fact that the land had been mortgaged to the appellant under Lao PDR law. (paras 36-40)

**(3)** The burden and onus of proof to produce the proper applicable law laid squarely upon the respondents to establish their counterclaim. This was so fundamental and hence did not behove on the appellant to have to raise it at trial. (para 42)

**(4)** The application of the doctrine of estoppel was circumstantial dependent upon the conduct of the parties. From the totality of the evidence adduced by the respondents, this court was unable to find that the appellant had unequivocally acquiesced to Malaysian law as the applicable law for purposes of the trial of the counterclaim. Moreover, estoppel is an equitable principle that is subject to the operation of law. Hence, equity follows the law (*aequitas sequitur legem*). The appellant, in the totality of circumstances herein, was not estopped from insisting on the strict application of the proper applicable law in determining the counterclaim. (para 45)

**(5)** Since the parties have expressly agreed to cl. 7(a) of the security agreement that the security may be realised at such prices as it may deem best, this provision negatived any duty of care allegedly owed by the appellant to the respondent not to dispose of the land without prior

ascertainment of its true market value. It could not be simply assumed that Malaysian law applies in the interpretation of the relevant contractual provisions. In fact, cl. 7.2 of the security agreement itself was ambiguous on the applicable law of contract, *to wit*: "law of Malaysia and/or Lao PDR as the case may be any other law acceptable to EXIM BANK." (paras 51-54)

**(6)** There was a fundamental and material error of law here committed by the HCJ which warranted appellate intervention. The HCJ was plainly wrong for not applying the proper applicable law, particularly the double actionability rule that required the respondents to establish there was the alleged duty of care on the part of the appellant under Lao PDR law. (para 46)

**Case(s) referred to:**

*Azman Tay & Associates Sdn Bhd v. Sentul Raya Sdn Bhd [2002] 4 CLJ 391 HC* ***(refd)***
*Boys v. Chaplin [1971] AC 356* ***(refd)***
*Chan Kwon Fong & Anor v. Chan Wah [1977] CLJU 12; [1977] 1 LNS 12 FC* ***(refd)***
*Chong Thian Fook & Ors v. Sarawak Shell Bhd & Ors [2009] 5 CLJ 605 FC* ***(refd)***
*CIMB Islamic Bank Bhd v. Khairuddin Abu Hassan [2021] 4 CLJ 375 CA* ***(refd)***
*Dynamit AG v. Rio Tonto Co [1918] AC 260* ***(refd)***
*Elders Keep Ltd v. Luen Mei Plastic Industries Sdn Bhd & Ors [1989] 2 CLJ 1005; [1989] 1 CLJ (Rep) 517 HC* ***(refd)***
*Hong Yik Trading v. Liziz Plantation Sdn Bhd [2017] 8 CLJ 491 FC* ***(refd)***
*Lew, Solomon v. Kaikhushru Shiavax Nargolwala And Others And Another Appeal [2021] SGCA (I) 1* ***(refd)***
*Lim Geak Lian v. East West Umi Insurance Bhd [1997] 4 CLJ 405 FC* ***(refd)***
*Looi Wooi Saik v. PP [1962] CLJU 94; [1962] 1 LNS 94 HC* ***(refd)***
*Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA* ***(refd)***
*Lung Yung & Thai Yung (Owners Of) v. Sadit Timber Sdn Bhd & Anor [1983] 2 CLJ 246; [1983] CLJ (Rep) 252 FC* ***(refd)***
*Ng Hoo Kui & Anor v. Wendy Tan Lee Pheng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC* ***(refd)***
*Ortus Expert White Sdn Bhd v. Nor Yanni Adom & Anor [2022] 2 CLJ 661 FC* ***(refd)***
*Phillips v. Eyre (1870) LR 6 QB 1* ***(refd)***
*Portcullis Trustnet (Singapore) Pte Ltd v. George Pathmanathan Michale Gandhi Nathan & Ors [2017] CLJU 182; [2017] 1 LNS 182 HC* ***(refd)***
*Sun Holding (Sun Park Hotel) Co Ltd & Ors v. Export-Import Bank Of Malaysia Bhd [2016] 6 CLJ 548 CA* ***(refd)***
*Sun Holding (Sun Park Hotel) Co Ltd & Ors v. Export-Import Bank Of Malaysia Bhd [2019] CLJU 939; [2019] 1 LNS 939 CA* ***(refd)***
*The Attorney General Of Hong Kong v. Zauyah Wan Chik & Ors & Another Appeal [1995] 3 CLJ 35 CA* ***(refd)***
*The Parchim [1918] AC 157* ***(refd)***
*Yeohata Machineries Sdn Bhd & Anor v. Coil Master Sdn Bhd & Ors [2016] 2 CLJ 414 CA* ***(refd)***

**Legislation referred to:**

Civil Law Act 1956, s. 3
Evidence Act 1950, ss. 101, 114, 114A
Rules of Court 2012, O. 18 r. 11

A *For the appellants - Kamarul Hisham Kamarudin, Cliff Siow Juan Wen & Syuhada Mohd Soberi; The Chambers of Kamarul Hisham & Hasnal Rezua*
*For the respondents - Alvin Tang, Teo Ju Li & Angela Low Yun Hui; M/s Alvin Tang Law Office*

*[Editor's note: Appeal from High Court, Seremban; Civil Suit No: 22-351-2010 (overruled).]*

B *Reported by Suhainah Wahiduddin*

## JUDGMENT

**Lim Chong Fong JCA:**

C **Introduction**

**[1]** This is an appeal against the decision of the High Court that found a financial institution in breach of its duty of care while exercising its power of sale of properties secured pursuant to loan facilities given to undertake
D property development in Lao People's Democratic Republic ("Lao P.D.R.").

**[2]** The appellant is a development financial institution owned by the Minister of Finance incorporated and under the purview of the Ministry of Investment, Trade and Industry.

E **[3]** The first respondent is a Laotian company, and the second and third respondents are Malaysian individuals.

**[4]** We heard the appeal on 19 October 2023 and 4 January 2024 and thereafter adjourned our decision to deliberate on the submissions advanced
F before us.

**[5]** Having duly done so, we hereby give our decision below together with the supporting grounds.

**Background**

G **[6]** Sometime in 2002/2003, the Government of Lao P.D.R. requested the first respondent associated with Rancang Timur Sdn Bhd to construct a hotel for the 10th ASEAN Summit to be held in 2004.

**[7]** Consequently, by a master agreement dated 14 July 2003 and land lease agreement dated 3 June 2004, the Government of Lao P.D.R. leased
H to Rancang Timur Sdn Bhd a plot of land of approximately 236,420 square metres in size located alongside the Mekong River in Donh Chanh, Vientiane, Lao P.D.R. ("land"). The land has been partly designated hotel development land and undeveloped land of 60,612 square metres and 157,808 square metres in size respectively.

I **[8]** The first respondent procured loan financing amounting to USD 14,000,000 to develop the hotel and tourist complex from the appellant ("loan").

**[9]** Toward this end, the appellant and the first respondent executed the following:

(i) facility agreement dated 19 January 2004;

(ii) supplementary agreement dated 25 February 2004;

(iii) security agreement dated 15 September 2004;

(iv) additional facility agreement dated 15 September 2004;

(v) cash collateral agreement dated 15 September 2004; and

(vi) deed of assignment (project accounts and/or sales proceeds) dated 15 September 2004.

There were also third party first legal charges as well as third party second legal charges over various properties in Malaysia executed in favour of the appellant.

**[10]** Moreover, the appellant and Rancang Timur Sdn Bhd executed the following:

(i) mortgage agreement dated 15 September 2004;

(ii) deed of assignment (rights under the master agreement) dated 15 September 2004; and

(iii) deed of assignment (rights under the land lease agreement) dated 15 September 2004.

The Government of Lao P.D.R. *via* its letters dated 5 October 2004 and 6 October 2004 consented to the abovementioned assignments.

**[11]** In addition, the appellant and the second and third respondents as well as Dato' Cheok Thian Sang executed the following:

(i) irrevocable and unconditional joint and several guarantee dated 25 February 2004; and

(ii) irrevocable and unconditional joint and several guarantee dated 20 September 2004.

**[12]** Subsequently, the appellant and the first respondent agreed to the re-structuring of the loan as well as the provision of an additional loan of USD29,237,359.56 ("additional loan") and accordingly executed the restructuring agreement dated 12 September 2006.

**[13]** The first respondent in 2009 defaulted on the re-structured loan and the appellant, as a result on 8 September 2009, terminated the loan facilities and demanded re-payment of the sum of USD35,852,060.66.

**[14]** Thus in 2010, the appellant exercised its power of sale under the mortgage agreement as well as the deed of assignment (rights under the master agreement) and deed of assignment (rights under the land lease agreement).

**[15]** Consequently, the appellant and CAMCE Investment (Lao) Co Ltd ("CAMCE") executed the sale and purchase agreement of the land dated 25 November 2011 at the consideration of USD36,000,000 as well as the first supplementary agreement dated 12 April 2011, and second supplementary agreement dated 27 June 2011 thereto.

**[16]** The land including the Donn Chanh Palace Hotel built thereon has been subsequently transferred to Mascena Co Ltd which is a special purpose vehicle 51% owned by the appellant and 49% owned by CAMCE. The rights to manage the Donn Chanh Palace Hotel were later assigned to CAMCE.

**[17]** The appellant also on 25 November 2010 commenced Negeri Sembilan High Court suit no. 22-351-2010 against the respondents and Dato' Cheok Thian Sang for the recovery of the loan arrears.

**In The High Court**

**[18]** The appellant claimed for the outstanding amount owed by the respondents and Dato' Cheok Thian Sang pursuant to cl. 4.1 of the facility agreement as well as the irrevocable and unconditional joint and several guarantees respectively.

**[19]** However, the respondents and Dato' Cheok Thian Sang counterclaimed for breach of duty of care in respect of the appellant's disposal of the security of the loan facilities.

**[20]** The High Court initially allowed the claim and dismissed the counterclaim. The decision was confirmed by this court on appeal as reported in [2016] 6 CLJ 548 CA. However, on further appeal to the Federal Court, the counterclaim was remitted back to be re-tried by the High Court. The Federal Court, in this regard, answered the following question in the negative:

> Does a choice of law clause in a contract between a Malaysia and a company incorporated in a foreign country in respect of a mortgage of foreign land determine the jurisdiction of a Malaysian Court to entertain a dispute arising out of that mortgage when the parties have submitted to the non-exclusive jurisdiction of the Malaysian courts?

In other words, the High Court has the jurisdiction to try the counterclaim.

**[21]** The High Court thereafter struck out the counterclaim on jurisdictional grounds but that was reversed by this court on appeal and remitted back again to the High Court for trial as reported in [2019] CLJU 939; [2019] 1 LNS 939.

**[22]** After trial, the learned High Court Judge ("HCJ") on 3 March 2022 allowed the counterclaim and ordered ("judgment") as follows: A

(i) that a fresh valuation to be conducted on the Secured Property to determine the market value of the same at the time of the sale of the Secured Property to determine the direct loss due to the undervaluation of the Secured Property at the time of the sale; B

(ii) the plaintiff to release and discharge all Third-Party Legal Charges listed in Schedule 3 of both the Facility Agreement dated 19.1 2004 (as amended by the Supplementary Agreement dated 25.4.2004) and the Additional Facility Agreement dated 15.9.2004;

(iii) general damages to be assessed; C

(iv) exemplary/punitive damages to be assessed;

(v) aggravated damages to be assessed; and

(vi) interest on all damages and monetary awards from the date of the Order today at the rate of 5% per annum D

**[23]** The HCJ's principal reason and conclusion for so allowing the counterclaim are set out in paras. (42) and (43) as well as (101) and (102) of the judgment as follows:

(42) In the present case, the Secured Property was mortgaged to the plaintiff. Hence, the law would be on the duty of care which ought to be exercised by the mortgagee (in our case, is the plaintiff) when it exercised its power of sale of the Secured Property. It is trite principle of law that, a mortgagee in exercising its power of sale over Secured Property, owes a duty of care to the mortgagor when it sells the Secured Property. This principle is derived from the landmark case of the English Court of Appeal in *Cuckmere Brick Co v. Mutual Finance* [1971] 2 AER 633 which held that: E F

> … in exercising the power of sale, however the mortgagee was not merely under a duty to act in good faith, *ie*, honestly and without reckless regard for the mortgagor's interest, but also to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell. G

(43) From the aforesaid, there are 2 primary duties required of the mortgagee, namely:

(i) to take reasonable care to ascertain the true market value of the Secured Property; and H

(ii) to act in good faith without reckless disregard to the mortgagor's interest.

These duties are of paramount interest because when effecting a sale of the Secured Property, if there is surplus from the proceeds of such sale, such proceeds is being held on trust by the mortgagee for the mortgagor. This can be discerned from the speech of Salmond LJ in Cuckmere at page 643 when His Lordship said that: I

> … if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee.
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> …
>
> (101) From the evidence it is clear that the sale of the Secured Property was sold by the plaintiff with no proper valuation. Hence, the sale sum of the Secured Property at USD36 million does not reflect the accurate value of the same.
>
> (102) I find that the plaintiff has breached the duty of care in exercising its power of sale of the Secured Property. It failed to take any reasonable steps to obtain the true value of the Secured property prior to the sale. It also breached its duty to act in good faith when the plaintiff gained ownership of the Hotel and the Hotel Land without assigning any of its inherent value which may offset any sums owing under the Facilities.

**[24]** The appellant is dissatisfied with the judgment and has on 4 April 2022 lodged its appeal to the Court of Appeal.

## Findings Of This Court

**[25]** In the *locus classicus* case of *Ng Hoo Kui & Anor v. Wendy Tan Lee Pheng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 on appellate intervention of trial decisions, Zaleha Yusof FCJ cogently held as follows with emphasis added by us:

> [71] From the aforesaid authorities, there appears to be a difference in approach taken and applied by the UK Supreme Court and the approach taken by the Malaysian courts. Whilst Lord Reed in *Henderson* (*supra*) separated the four non-exhaustive identifiable errors of a trial judge from the plainly wrong test:
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> (i) a material error of law;
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> (ii) a critical finding of fact which has no basis in the evidence;
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> (iii) demonstrable misunderstanding of relevant evidence; and
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> (iv) a demonstrable failure to consider relevant evidence;
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> (all of which justifies appellate intervention of a trial judge's decision), this court in *Gan Yook Chin* (*supra*) effectively included them under what amount to the trial judge as being "plainly wrong".
>
> [72] The phrase "lack of judicial appreciation of evidence" used in *Gan Yook Chin* (*supra*) could very well encompass three out of four errors of a trial judge (other than the "material error of law") said to be identifiable by Lord Reed in *Henderson* (*supra*), namely:

(i) critical factual finding which has no basis in evidence;

(ii) demonstrable misunderstanding of relevant evidence; and

(iii) demonstrable failure to consider relevant evidence.

[73] *Given that the issue at present is about identifying situations where the findings of fact by a trial court justify appellate intervention, the other identifiable error of "material error of law" listed by Lord Reed in Henderson (supra) can occur when a trial judge erroneously apply legal principles (eg, rules of evidence) in the course of making a finding of fact, thus resulting in a lack of judicial appreciation of evidence. For example, when a trial judge erroneously placed a burden of proof on a party, that will lead the judge to misdirect himself when he attempts to interpret the factual matrix before him.* The commission of material error of law by the trial judge in arriving at his conclusions (*eg*, the requirement of proof of intention in constructive trust as opposed to express trust), also justifies an appellate court reversing such conclusions.

[74] Thus, whilst there is a slight difference in approach of appellate intervention, both the UK Supreme Court and our Federal Court effectively shares a common thread where it has been held that appellate intervention is justified where there is lack of judicial appreciation of evidence.

[75] The Court of Appeal in Singapore applies the plainly wrong test which is similar to our Federal Court, as illustrated in *Damu Jadhao v. Paras Nath Singh* [1965] CLJU 30; [1965] 1 LNS 30; [1976] 1 MLJ 151, when it held:

> The principles under which an appellate court acts when an appellant seeks to displace the conclusion arrived at by a trial judge on questions of fact have been very recently restated by the Privy Council in the case of *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] CLJU 202; [1964] 1 LNS 202; [1964] MLJ 92 and [1965] 2 MLJ 151 at 153 need only refer to a passage of the judgment of Lord Guest when dealing with the matter, where he states:
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> > Before the Court of Appeal in Singapore was entitled to reject the trial judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.
> >
> > This case seems to me to be completely dependent on the trial judge's estimate of the credibility of the appellant and his witnesses and nothing that counsel for the appellant has put forward in his arguments before me has persuaded me that the trial judge's view of the credibility of the witnesses before him was in any way plainly wrong.

[76] *What is pertinent is that, the "plainly wrong" test is not intended to be used by an appellate court as a mean to substitute its own decision for that of the trial court on the facts.*

A [77] It is to be observed that this court in *Tengku Dato' Ibrahim Petra Tengku Indra Petra* (*supra*) had referred to *McGraddie* (*supra*) and *Henderson* (*supra*) and has adopted the *Henderson* (*supra*) approach of the plainly wrong" test in determining whether the trial court's findings of fact is reversible upon appeal:

B Recently in *Henderson v. Foxworth Investments Ltd and Another* [2014] 1 WLR 2600, the United Kingdom Supreme Court held that in the absence of some other identifiable error, such as a material error of law or the making of a critical factual finding which had not interfered with the factual finding which had no basis in the evidence, an appellate court should not interfere with the factual
C findings of a trial judge unless it was satisfied that the decision of the trial judge was "plainly wrong" in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached, and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it
D considered that it would have reached a different conclusion from the trial judge.

[78] *Hence following this court's ruling in Tengku Dato' Ibrahim Petra Tengku Indra Petra (supra) an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was "plainly*
E *wrong" where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid category, it is irrelevant, even if the appellate court thinks that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.*

F [79] The outcome of the present appeal would therefore turn upon whether the findings of the learned trial judge were reasonably made.
(emphasis added)

**[26]** Based on the memorandum of appeal and submissions of the parties, we distil two principal issues here that needed our review and determination,
G *viz*:

(i) whether the appellant bank has the duty of care in law to ensure the best possible price is obtained whilst disposing of the land; and

(ii) whether, if so, the duty of care has been negatived by the contractual provisions entered into by the parties in connection with the loan.

H **[27]** We will deal with them *seriatim*.

*Duty Of Care In Disposal Of The Land*

**[28]** The concept of duty of care is undoubtedly part and parcel of the law of tort of negligence.
I

**[29]** According to the appellant, the applicable law of tort of negligence is Lao P.D.R. law by virtue of the following agreed fact between the parties noted in the statement of agreed facts dated 28 October 2013: A

> The Land was mortgaged to the Plaintiff under the laws of the Lao P.D.R.

However, the HCJ applied English common law of tort on duty of care on the assumption that the applicable law of tort on duty of care exists and is similar under Lao P.D.R. law in respect of the sale of mortgaged Laotian land. B

**[30]** Although it has been settled by the Federal Court that the Malaysian Court has jurisdiction to decide the counterclaim of the respondent on the alleged negligence of the appellant in disposing the land without prior ascertaining its true market value, we find that it is still incumbent upon the High Court to apply the proper applicable law of tort. C

**[31]** In this respect, it is provided as follows in r. 203 of the authoritative treatise Dicey & Morris on *The Conflict of Laws* 12th edn (1993): D

> (1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both
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> > (a) actionable as a tort according to English law, or in other words is an act which done in England, would be a tort; and E
> >
> > (b) actionable according to the law of the foreign country where it was done.
>
> (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties. F

**[32]** Rule 203 cls. 1(a) and (b) which is popularly known as the double actionability rule is based on the seminal pronouncement of Willes J in *Phillips v. Eyre* (1870) LR 6 QB 1. It is re-affirmed in *Boys v. Chaplin* [1971] AC 356 but may be subject to r. 203 cl. (2). Lord Wilberforce however held as follows on r. 203 cl. (2) in *Boys v. Chaplin* (*supra*): G

> It will not be invoked in every case, or even, presumably, in many cases …

**[33]** The law in England has since changed by the enactment of the Private International Law (Miscellaneous Provisions) Act 1995. Nonetheless, r. 203 remains applicable here by virtue of s. 3 of the Civil Law Act 1956. H

**[34]** Thus, in *Chan Kwon Fong & Anor v. Chan Wah* [1977] CLJU 12; [1977] 1 LNS 12; [1977] 1 MLRA 68, Raja Azlan Shah FJ (later LP) held as follows with emphasis added by us: I

*It is necessary, in my view, to ascertain the rule of private international law which defines the conditions of civil liability in this country for an act done abroad. As the law stands it must be accepted that an action of tort will lie in Malaysia for a wrong alleged to be committed in a country outside Malaysia if two conditions are fulfilled. Firstly, the wrong must be of such a character that it would have been actionable if it had been committed in Malaysia. Secondly, it must not have been justifiable by the law of the country where it was committed.*

It was Willes J who expressed the proposition some 100 years ago in *Phillips v. Eyre, supra*, a case concerning the jurisdiction of English courts in cases of foreign torts. The first branch of the statement was derived from the decision in *Liverpool, Brazil, and River Plate Steam Navigation Co Ltd v. Banham* (*The Halley*) although in that case the Privy Council held that the defendant was not liable in England for an act done abroad by another defendant, not because of the character of the act according to English law, but because the person who did it was not one for whose defaults the defendant was liable according to English law. This branch of Willes J's statement of the law is free from ambiguity. It is the second branch of his statement, expressed by the phrase "not justifiable", that has provoked criticism. The respondent claimed that he needed only to establish the first branch of the rule, not the second. In other words, it is said in order to found jurisdiction in respect of a foreign tort, a plaintiff need only prove that the wrong is of such a character that it is actionable according to the *lex fori*, and if that is established, then it is for the defence to show that the wrong is justified by the *lex loci delicti*, relying on the words of Rigby LJ in *Machado v. Fontes*:

> I think there is no doubt at all that an action for a libel published abroad is maintainable here, unless it can be shown to be justified or excused in the country where it was published; a negative averment, thus falling on the defence to establish it.
>
> …

*In my opinion, with regard to the choice of law the generally accepted rule is that an act committed abroad is a tort and actionable as such only if it is both actionable as a tort in this country as well as in the country where it was done. It is here we must be careful to consider two separate issues – jurisdiction and the choice of law, for they are logically distinct and separate.* Windeyer J in *Anderson v. Eric Anderson Radio & TV Pty Ltd* [1965] 114 CLR 20 42 puts the matter succinctly in this passage:

> When in *Koop v. Bebb* this court spoke of 'the rule of private international law which defines the conditions of civil liability' in one State for an act done in another, the reference was not, as I read the judgment, merely to the entertaining of an action but also to the substantive law for determining liability in an action.

Once the cause of action is established, then it is a matter of determining the nature of the plaintiffs remedy which is partly procedural and partly substantive - the actual quantification of damages under the relevant heads being procedural; questions whether loss of earning capacity or pain

and suffering are admissible heads,of damage being questions of substantive law. I may as well add that the nature of the plaintiff's remedy is to be determined by the *lex fori*. (See the speech of Lord Hodson in *Boys v. Chaplin supra*, at pages 378, 379).

Accordingly, our courts, following English practice, have jurisdiction in respect of foreign torts whenever we have jurisdiction *in personam* over the defendant. That is clearly stated in *Halsbury's Laws of England*, 4th Ed, para 406, page 308:

> In general, the English court has jurisdiction in actions *in personam* against any person who is present in England when the writ of summons or other originating process is served upon him. As a general rule the domicile, residence and nationality of the parties are all immaterial. In certain cases, the court may make an order for substituted service, or for service outside the jurisdiction.
>
> The parties may by their conduct give the English court a jurisdiction which it would not otherwise possess. By coming to the English court as a plaintiff, a person gives it jurisdiction over any counterclaim brought by the defendant. A writ is deemed to have been duly served on the defendant if he enters an unconditional appearance, or if his solicitor indorses on the writ a statement that he accepts service of the writ on his behalf. A contract may provide that the English court shall have jurisdiction over any action in respect of the contract, and may contain special provisions as to. the mode and place of service.
>
> …

In my opinion, no difficulty arises in this case as to the High Court's jurisdiction over the appellants. The trouble starts when we consider the choice of law. *It is here, in my view, the respondent has to establish both the conditions laid down in Phillips v. Eyre Dicey & Morris* in their *Conflict of Laws*, 9th Ed, r. 178, supports this view; so also, *Halsbury's Laws of England*, 4th Edn, paras. 615-620. (emphasis added)

**[35]** Furthermore, in *The Attorney General Of Hong Kong v. Zauyah Wan Chik & Ors & Another Appeal* [1995] 3 CLJ 35; [1995] 1 MLRA 427, Gopal Sri Ram JCA (later FCJ) stated as follows:

> [24] I derive support for the view I take of the matter from the decision of the Federal Court in *Chan Kwong Fong & Anor v. Chan Wah* [1977] 1 MLRA 68; [1977] 1 MLJ 232. Raja Azlan Shah FJ (as he then was), delivering the unanimous decision of the Court, reviewed the authorities and set out the applicable law with such trenchant lucidity …

**[36]** Since the respondents are the parties who pursued the counterclaim for breach of duty of care by the appellant, it is plain pursuant to s. 101 of the Evidence Act 1950 that the respondents bear the legal burden of proof that their counterclaim is sustainable under the applicable law.

**[37]** In *Hong Yik Trading v. Liziz Plantation Sdn Bhd* [2017] 8 CLJ 491, Arifin Zakaria CJ held as follows with emphasis added by us:

> [12] *It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist* (s. 101 of the Evidence Act 1950). Where a party on whom the burden of proof lies has discharged that burden, then the evidential burden shifts to the other party. *However, if the party on whom the burden of proof lies fails to discharge it, the other party need not call any evidence.* This is highlighted in the case of *Selvaduray v. Chinniah* [1939] CLJU 107; [1939] 1 LNS 107; [1939] 1 MLJ 253 where Terrell, Ag CJ stated:
>
> > ... it is clear that the onus is on the plaintiff to prove his case. After the conclusion of the whole case, there must be some preponderance in his favour. *It may be true that the plaintiff established a prima facie case, but at the conclusion of the trial, the learned Judge has found that the position was exactly even, ie, that any preponderance in the plaintiff's favour had disappeared. That being the case, the plaintiff must necessarily fail, as he has not discharged the onus which is upon him …* (emphasis added)

See also *Yeohata Machineries Sdn Bhd & Anor v. Coil Master Sdn Bhd & Ors* [2016] 2 CLJ 414.

**[38]** As to the nature of the proof required, Eusoffe Abdoolcader FJ held as follows in *Lung Yung & Thai Yung (Owners of) v. Sadit Timber Sdn Bhd & Anor* [1983] 2 CLJ 246; [1983] CLJ (Rep) 252 as follows with emphasis added by us:

> The question of limitation turned substantially on the application and construction of the provisions of the law of Taiwan in the Act of 1929 and also its "Regulations for Clearing Imported Logs through Customs". *The whole matter appears to have proceeded on false premises in that the question in issue was presented and indeed determined by the learned Judge virtually taking judicial notice of the relevant laws of Taiwan that appeared to be applicable. This was clearly wrong as foreign law on a particular topic is a question of fact which is to be and can be proved by evidence of experts (s. 45(1) of the Evidence Act, 1950; Mak Sik Kwong v. Minister Of Home Affairs, Malaysia (No. 2) [1975] CLJU 97; [1975] 1 LNS 97).* No expert evidence was adduced and the foreign law sought to be relied on was not proved as it should have been. As the question of delivery and limitation revolved around the application of the relevant statutory provisions of Taiwan, the merits of the contentions on this aspect should not have been determined in the way it was sought to be … (emphasis added)

**[39]** It is not in dispute that the respondents did not lead any expert evidence whatsoever on the law of tort of negligence of the Lao P.D.R.

**[40]** Consequently, it follows that the respondents did not satisfy the double actionability rule (r. 203 cls. (1)(a) and (b)) which we find is critical in law for them to succeed on their counterclaim. We further find that the limited exception (r. 203 cl. (2)) is inapplicable because the respondent has

not demonstrated cogent reasons to justify invocation of the same. That notwithstanding and even if r. 203 cl. (2) is applicable, we find the law that has the most significant relationship to the occurrence of the tort and the parties is still Lao P.D.R. law by reason that the land concerned is situated in Lao P.D.R. as well as that the first respondent is a Lao P.D.R. registered company. Additionally, it is an agreed fact that the land had been mortgaged to the appellant under Lao P.D.R. law.

**[41]** We are aware the respondents contended the appellant has not pleaded that the applicable law is Lao P.D.R. law. We, however, find that there is no mandatory requirement to plead law in O. 18 of the Rules of Court 2012. Based on O. 18 r. 11, pleading law is merely permissible.

**[42]** Be that as it may, the respondents further contended that this vital issue on the applicable law was neither put to witnesses nor argued during the course of the trial before the HCJ. We have, in this regard, noted that Richard Malanjum CJSS (later CJ) held as follows in *Chong Thian Fook & Ors v. Sarawak Shell Bhd & Ors* [2009] 5 CLJ 605; [2009] 5 MLJ 322 with emphasis added by us:

> [51] Further, we are inclined to agree with the submission of learned counsel for the respondents that since the issue of estoppel, let alone the species of estoppel, was not raised amongst the questions posed for determination under O. 14A it should not arise in this first appeal. *This is in consonant with the proposition of law accepted in our jurisdiction that 'as a general rule, a new point cannot be raised in an appeal, which was not pleaded or argued in the courts below.'*
>
> [52] *However the foregoing rule is subject to certain exceptions.* They are, first, that a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction (See: *Hua Daily News Bhd. v. Tan Thien Chin & Ors.* [1985] CLJU 131; [1985] 1 LNS 131; [1986] 2 MLJ 107); and, *second, the Court of Appeal would entertain a point of law not raised in the court below if it would result in the rectification of an erroneous order'* as for instance the effect of illegality. (See: *Yong Mok Hin v. United Malay States Sugar Industries Ltd* [1967] CLJU 220; [1967] 1 LNS 220; [1967] 2 MLJ 9; *Muniandy & Anor v. Muhammad Abdul Kader s/o Muhamad Saheed & Ors* [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116; *Keng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1989] 1 CLJ 897; [1989] 1 CLJ 1 (Rep) 1). *In considering this point however it is prudent to bear in mind what was said by Lord Wrenbury in Banbury v. Bank of Montreal [1918] AC 626 at p. 714:*
>
> > *The result of the contention, if it be correct, is that the Court of Appeal is bound to make an erroneous order because of a point of law has been overlooked below. It may well be that under the circumstances the Court of Appeal could not justly allow the point of law to be raised. For instance, it may be that if the point had been raised in the court of the first instance the party whose interest it was to dispute it would or could have called evidence which would affect the result. If so, the Court of Appeal would no*

A *doubt say that it would not be fair to allow it to be raised. But that is a totally different thing from saying that it cannot be raised.*

(emphasis added)

There is plainly an erroneous order made by the HCJ by virtue of the adoption of the wrong applicable law. However, the burden and onus of B proof to produce the proper applicable law laid squarely upon the respondents to establish their counterclaim. This is so fundamental and hence does not behove on the appellant to have to raise it at trial in our view. It is unlike a demurrer of the appellant which has to be raised early to alert the respondent to respond to it at trial such as in *Luggage Distributors (M) Sdn Bhd* C *v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 2 MLJ 416 relied by the respondents. Hence, we find it is not unfair even though this has been raised for the first time on appeal to rectify the erroneous order. We observed that Mohamed Dzaiddin FCJ (later CJ) held as follows in *Lim Geak Lian v. East West Umi Insurance Bhd* [1997] 4 CLJ 405 with emphasis added by us:

D [1a] A point which is not raised at the trial and which is raised for the first time in the appellate court must always be most jealously scrutinised. The question of whether effect should be given to such a point is however, one for discretion. *When a question of law is raised for the first time in a court of last resort, upon construction of a document, or upon facts either admitted or proved beyond controversy, it is not only* E *competent but expedient, in the interests of justice, to entertain the plea.*

(emphasis added)

**[43]** We noted the respondents also contended they were entitled to presume that Malaysian law is the same and accordingly applied in the absence of proof of Lao P.D.R. law following, amongst others, the cases of F *Elders Keep Ltd v. Luen Mei Plastic Industries Sdn Bhd & Ors* [1989] 2 CLJ 1005; [1989] 1 CLJ (Rep) 517 and *Portcullis Trustnet (Singapore) Pte Ltd v. George Pathmanathan Michale Gandhi Nathan & Ors* [2017] CLJU 182; [2017] 1 LNS 182; [2017] MLJU 223 which followed English law. We, however, find that admissible presumptions at trial are codified in ss. 114 and 114A of the G Evidence Act 1950 only. These are presumptions of fact, and we hold there is no room for the importation and application of other common law presumptions here including on foreign law as adopted by the English Court in *Dynamit AG v. Rio Tonto Co* [1918] AC 260 and *The Parchim* [1918] AC 157. It must be remembered that in the treatise *Evidence: Practice and Procedure* H 4th edn, Augustine Paul FCJ stated the full title of the Evidence Act 1950 is "An Act to define the law of evidence". It is, in other words, a descriptive codification of English law relating to the evidence; see *Looi Wooi Saik v. PP* [1962] CLJU 94; [1962] 1 LNS 94; [1962] MLJ 337. Being a codifying statute, the Evidence Act 1950 therefore exhaustively brings together all the I strands of the subject matter of the laws of evidence. See also the Singapore case of *Lew, Solomon v. Kaikhushru Shiavax Nargolwala And Others And Another Appeal* [2021] SGCA (I) 1 where the *lex fori* was not presumed and used to resolve the matter.

**[44]** It is again gainful here to refer to *Chan Kwon Fong & Anor v. Chan Wah* (*supra*) where Raja Azlan Shah FJ (later LP) held as follows with emphasis added by us:

> I now turn to the present case. *There is no doubt that the wrong done to the respondent is actionable here, but there is doubt that an actionable wrong, by Indonesian law was committed in Samarinda, Kalimantan, Indonesia. No evidence was led to this point,* and, indeed, there is not a scintilla of evidence directed to this issue. *As it is, since the person who wishes to establish a claim in respect of a foreign tort must also show that it is actionable in the foreign country, he must fail in his claim if he leads no evidence on the point.* The speech of Lord Hodson in *Boys v. Chaplin* (page 379) is in point:
>
> > If it were clear that there existed in Malta in this case civil liability for the wrong done there would be no obstacle in the respondent's way, for in principle a person should in such circumstances be permitted to claim in this country for the wrong committed in Malta. This is to state the general rule as generally accepted which takes no account of circumstances peculiar to the parties on the occurrence. The existence of the relevant civil liability is, however, not clear in this case.
>
> *I would allow the appeal with costs here and below. It may be argued that this is a fit case for a re-trial. In my opinion, as the respondent has failed to prove his case, he cannot be allowed to have a second bite at the cherry.* (emphasis added)

**[45]** Finally, we are mindful that the respondents contended the appellant must be estopped from raising this issue on the applicable law because the appellant has, during the course of the litigation from 2010 to 2022, accepted the position that Malaysian law and not Lao P.D.R. law is the applicable law following *Ortus Expert White Sdn Bhd v. Nor Yanni Adom & Anor* [2022] 2 CLJ 661; [2022] 2 MLJ 67. Toward this end, the appellant relied on Malaysian law to obtain judgment against the first respondent to recover the sums due under the loan facilities. Moreover, there is no issue of Lao P.D.R. law raised in the statement of issues to be tried nor in the after-trial closing submissions of the appellant. It is our view that the application of the doctrine of estoppel is circumstantial dependent upon the conduct of the parties. From the totality of the evidence adduced by the respondents, we are unable to find that the appellant had unequivocally acquiesced to Malaysian law as the applicable law for purposes of the trial of the counterclaim. Moreover, and as contended by the appellant, estoppel is an equitable principle that is subject to the operation of law. Hence, equity follows the law (*aequitas sequitur legem*), see *Azman Tay & Associates Sdn Bhd v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 391. In this respect, we find and hold that the appellant, in the totality of circumstances herein, is not estopped from insisting on the strict application of the proper applicable law in determining the counterclaim.

**[46]** Consequently, based on the findings of the HCJ in paras. (42) and (43) of the judgment, we find and hold that there is a fundamental and material error of law here committed by the HCJ which warrants appellate intervention. In this regard, the HCJ is plainly wrong for not applying the proper applicable law, particularly the double actionability rule that required the respondents to establish there was the alleged duty of care on the part of the appellant under Lao P.D.R. law.

**[47]** The appeal must accordingly be allowed on this premise alone.

*Contractual Provisions Negatived Duty Of Care*

**[48]** Pursuant to our finding on the first issue above, it is unnecessary for us to delve into this second issue. We will nonetheless briefly deal with it in the sake of completeness.

**[49]** The appellant contended that in the event the first respondent committed any default in the loan and additional loan, the appellant may exercise its rights pursuant to the various power of sale of all its interest of the securities it held in relation to the loan, *viz.*:

(i) foreclosure sale of the secured property under clause 5.03(d) of the Mortgage Agreement;

(ii) sale of the secured property as the assigned property under clause 3.1 of Deed of Assignment (Rights under the Master Agreement);

(iii) sale of the secured property as the assigned property under clause 3.1 of Deed of Assignment (Rights under the Land Lease Agreement); and specifically

(iv) sale of the secured property under clause 7(a) of the Security Agreement.

**[50]** It is pertinent to reproduce cl. 7(a) of the security agreement:

**7. Right And Remedies Upon Default**

(a) If any Event of Default shall occur and be continuing, EXIM BANK may exercise in addition to all other rights and remedies granted to it under this Security Agreement and under any other instrument or agreement securing, evidencing or relating to the Secured Accounts, all rights and remedies of EXIM BANK under the law of Malaysia and/or Lao P.D.R. as the case may be any other law acceptable to EXIM BANK. Without limiting the generality of the foregoing, the Borrower expressly agrees that in any such event, and during the existence and continuance of an Event of Default, EXIM BANK, without demand of performance or other demand, advertisement or notice of any kind (except the notice specified below of time and place of public or private sale) to or upon the Borrower or any other person (all and each of which demands, advertisements and notices are hereby expressly waived to the maximum extent permitted by the Malaysian Law and other applicable law), may

forthwith collect, receive, appropriate, and realize upon the Collateral, or any part thereof, and may forthwith sell, lease, assign, give an option or options to purchase or sell or otherwise dispose of and deliver the Collateral (or contract to do so), or any part thereof, in one or more parcels at public or private sale or sales, at any exchanges or broker's board or at any of EXIM BANK's offices or elsewhere at such prices it may deem best, for cash or credit or future delivery without assumption of any credit risk. EXIM BANK shall further have the right upon any public sale or sales, and to the extent permitted by law, upon such private sale or sales, to purchase the whole or any part of the Collateral so sold, free of any right or equity of redemption, which the equity of redemption the Borrower hereby releases. The Borrower shall remain liable for any deficiency if the proceeds of any sale or disposition of the Collateral are insufficient to pay all amounts to which EXIM BANK is entitled, the Borrower also being liable for the reasonable fees of any attorneys employed by EXIM BANK to collect such deficiency.

**[51]** Hence and since the parties have expressly agreed to cl. 7(a) of the security agreement that the security may be realised at such prices as it may deem best, this provision negatived any duty of care allegedly owed by the appellant to the respondent not to dispose of the land without prior ascertainment of its true market value.

**[52]** The appellant also referred and relied on the case of this court of *CIMB Islamic Bank Bhd v. Khairuddin Abu Hassan* [2021] 4 CLJ 375 where Abu Bakar Jais JCA (now FCJ) held as follows as summarised in the headnotes with emphasis added by us:

(3) The documents pertaining to the property, *ie*, the property purchase agreement, the property sale agreement, the deed of assignment and the power of attorney, showed that the respondent willingly agreed to hand over the property to the appellant for sale by public auction. The terms of the documents clearly did not provide for the notification of the intended auction to the respondent. Consequently, there was no duty on the appellant to notify the respondent about the proclamation. *The respondent, as someone who needed the facility then, chose to ignore or failed to appreciate the repercussions of his agreements on the terms of the documents. He must be bound by his agreement. Furthermore, the property was absolutely assigned to the appellant. This meant that the appellant had absolute discretion in dealing with the property as it deemed necessary. The property basically belonged to the appellant until full payment was made by the respondent for the facility he had obtained from the former. In fact, because of the absolute assignment, there was absolutely no requirement for the appellant to notify the respondent regarding the proclamation. The appellant had no duty of care under tort to the respondent to notify him of the proclamation. The appellant could not be found negligent, had not acted mala fide, had not committed fraud and could not be said to have breached its contractual obligation to the respondent.* Therefore, it did not matter whether there was correspondence sent to notify the respondent about the proclamation. At best, the letters sent were extra or additional service provided at the

courtesy of the appellant as a bank to the respondent being its customer. It was sent beyond the duty imposed on the appellant. The advertisement of the proclamation in the Malay Mail, which was not circulated in several States, counted for nothing. (paras 62, 63, 66, 67, 68 & 81).

**[53]** We have carefully read the judgment but do not find any finding made on this issue by the HCJ. That notwithstanding, it seems to us that the appellant is relying on Malaysian law particularly the case of *CIMB Islamic Bank Bhd v. Khairuddin Abu Hassan* (*supra*) to advance its stand that the contractual provisions especially cl. 7.2 of the security agreement negatived any duty of care owed by the appellant to the respondents in respect of disposing the land.

**[54]** However, we find that it cannot be simply assumed that Malaysian law applies in the interpretation of the relevant contractual provisions. In fact, cl. 7.2 of the security agreement itself is ambiguous on the applicable law of contract, to wit: "law of Malaysia and/or Lao P.D.R. as the case may be any other law acceptable to EXIM BANK".

**[55]** To make matter worse here, there is also no expert evidence led by the parties on the interpretation of the contractual provisions based on Lao P.D.R. law.

**[56]** In the premises, we make no finding on this second issue.

**Conclusion**

**[57]** For the foregoing reasons, particularly para. [46] above, we allow the appeal with costs of RM60,000 here and below subject to allocatur. The order of the High Court dated 3 March 2022 is set aside.